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TRIAL BY IMPEACHMENT.[1]

THE subject of trial by impeachment has recently assumed extraordinary importance. As it is a topic which lies beyond the ordinary range of legal study (this mode of trial being rarely exercised and practically dormant), I have thought it well to seize upon the factitious interest which at present attends it, to make some impression upon your minds. Although the knowledge of this subject is but of comparatively little direct advantage to a law student, yet it is not altogether without its uses, as it sheds light upon some prominent historical questions, and gives to the biographies of some of the most eminent men of England a tragic and pathetic interest. Circumstances also tend to show that impeachment will be more prominent in politics than formerly, so that new reasons for comprehending the subject are now presenting themselves.

The Constitution of the United States simply refers to the subject of impeachment without defining it. It assumes the existence of this mode of trial in the law, and silently points us to English precedents for knowledge of details. We are reminded of the statement, so often considered before, that "the constitu-

[1] This article was prepared by Prof. THEO. W. DWIGHT, as a lecture to the students of the Columbia College Law School, New York, and we have thought that the interest in the subject at the present time would make it specially acceptable to the profession.—EDS. A. L. R.

tion is an instrument of enumeration, and not of definition." This consideration serves to point out the difficulty and delicacy of the subject. The precedents to be examined are scattered over numerous volumes of state trials, or are collected in ill-arranged and now-forgotten treatises. They were rendered during the excitements of the most heated party contests; they were produced under the inflammatory harangues of demagogues and party leaders; interest, fear, and faction operated upon the minds of the court, which, though an august tribunal, is easily swayed, or at least affected, by the influences which beset a legislative assembly, of a kind unfavorable to the calmness of judicial action. Add to this that the case has but a single discussion. In all our ordinary judicial proceedings we have courts rising one above another in rank, in which repeated discussions are had, and a wide opportunity is given for the detection of errors and the rectification of mistakes of judgment. But in the grave questions decided on an impeachment, a single tribunal disposes of the question absolutely and for all time. It is doubtful whether there is any power to reverse a judgment once pronounced, though the court itself is convinced of its mistake. There should be no reversal, of course, when the criminal has been once acquitted.[1]

With these introductory remarks, I proceed to a consideration of the topics of the lecture.

It will be discussed under four principal divisions:—

I. THE NATURE OF AN IMPEACHMENT.

II. THE CRIMES FOR WHICH THIS MODE OF PROSECUTION MAY BE RESORTED TO.

III. THE METHOD OF PROCEDURE.

IV. GENERAL REMARKS.

I. *The Nature of an Impeachment.*—When a criminal act has been committed, it may evidently be regarded in three aspects: first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the

[1] A singular embarrassment arose in the trial of Attorney-General Herbert. The House of Lords had resolved that the Attorney-General should not lose that office. At a subsequent stage of the proceedings they resolved that he be incapable of holding any office whatever, except the one he now holds, though it was for misconduct in that office for which he was impeached: 4 How. S. T. 129.

administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the state or "the people," as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the king, by a process called an indictment; the wrong to the entire nation, by a proceeding termed an impeachment. In process of time the injury to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings—indictment and impeachment.[1]

The relation of these proceedings to Magna Charta may be briefly noticed. It will be remembered that the leading provision of that instrument is that no freeman shall be deprived of his life, liberty, or property, except by the judgment of his peers and the law of the land. These words only apply to a proceeding on the part of the king, and do not affect one on the part of the nation. In other words, they have reference to criminal proceedings in ordinary courts of justice, and have nothing to do with the process of impeachment: 2 Hallam's Const. Hist. 445. The United States Constitution, following the same idea, provides that the trial of all crimes except in cases of impeachment shall be by jury.

It will tend to a clearer understanding of our subject if the resemblances and contrasts of an indictment and impeachment be carefully pointed out. An indictment is a presentment in writing by a body of men not less in number than twelve nor more than twenty-three, of crimes committed within their own county. This presentment is made in an ordinary court of justice, *e. g.* the King's Bench. Its only effect is to pronounce the opinion of a majority of these men (grand jury) that there is apparent reason to believe that there has been a criminal violation of the law of the land by the person against whom the indictment is found. He is therefore arrested, and either held in custody or required to find sufficient security to await his trial. Notwithstanding his indictment, the law still presumes his innocence, and takes no action against him except that which is *necessary to secure his*

[1] It is said in 8 How. S. T. 231, that one and the same offence may entitle several persons to several remedies; as in murder, at common law the king may indict, or the heir or wife of the murdered party may appeal.

attendance at the trial. Anything more than this, any deprivation of property, any forfeiture of his civil rights, while the indictment is pending, is wholly opposed to the genius and spirit of the common law. The indictment in due course of law is brought on to trial before an assigned term of the criminal court. The case must now be presented to a trial-jury presided over by a judge. The government who has in charge the criminal must, notwithstanding the indictment, overcome the presumption of the prisoner's innocence; and only by the superiority of its proofs can a verdict be obtained against the prisoner. When judgment is entered upon the verdict, for the first time commence the penalties and forfeitures of the law. The convicted criminal may lose his property, his liberty, or life, as the result of the proceeding. It is thus seen that an indictment is nothing more than a method of trial established to introduce solemnity, deliberation, and caution into judicial proceedings. It pre-supposes the existence and definition of crimes. It is a method of trial, and nothing more.

If we now recur to an impeachment, it will be found that it, too, is a presentment by a body of men that a crime has been committed. It is no longer a presentment by a small number of twenty-three men, but of the entire House of Commons, representing the state which is supposed to have been injured. It, too, is made in writing under the name of Articles of Impeachment. The tribunal before whom the articles are brought is a court of justice, not the ordinary court, it is true, but still a court composed of the members of the House of Lords. It may entertain a presentment for any crime, whether it be a felony or misdemeanor, whether it be committed by a peer or commoner, and may attach to conviction the ordinary punishments.[1] As a matter of course, an impeachment is not confined to a particular county, as an indictment is, but the House of Commons may present cases arising anywhere within their jurisdiction. For this reason, impeachments were sometimes resorted to, because if treason were committed in Scotland or Ireland by an Englishman, though it might not be triable in an ordinary criminal court in England, as it was not committed in an English county, it is

[1] Though Blackstone controverts the opinion that a commoner may be impeached for a crime such as treason, yet the weight of authority and reason is overwhelmingly opposed to this view. See 2 Hallam's Const. Hist. 445, Bost. ed. 1854.

still under the jurisdiction of the House of Lords. Thus Lord Lovat, who, while in Scotland, was concerned in the rebellion of 1745, was impeached, as he had committed no overt act of treason in England so as to bring the case before an English jury: 5 Campbell's Lord Chancellors 106. His co-conspirators in England were indicted and not impeached.

The effect of an impeachment, like that of an indictment, is simply that there is apparent reason to believe that there has been a criminal violation of the laws by the individual impeached. He may in proper cases be arrested and held in custody or required to give security. The law still presumes his innocence, and can do no more than to take such steps as may be necessary to render his attendance at the trial certain. The trial must be conducted in accordance with the rules of evidence observed in the ordinary courts; the person impeached can only be convicted of a crime known to the law; the punishment follows that attached to the same crime by the ordinary courts. Forfeiture of rights can only occur after conviction. Impeachments, like indictments, are methods of procedure in criminal cases, and nothing more.[1]

The proceeding by impeachment being purely judicial, it must be distinguished from a Bill of Attainder and of Pains and Penalties. These must be regarded as pure legislative acts. The two houses then enact that a particular person is guilty of a crime. They may sometimes go through certain forms of judicial inquiry, but their decision is a *law*, not a *judgment*. Such bills are in utter violation of the principles of true constitutional government, as they confound legislative with judicial power. An impeachment is decided by the House of Lords alone. Any attempt on the part of the House of Commons to participate in this judicial power has always been highly resented by the House of Lords, and would not now be claimed.[2]

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[1] "Impeachments are but a method of trying offences," 15 How. S. T. 68. "An impeachment is a course of proceeding for treason the same as in case of grand jury, which is another method," 15 Id. 795. "They (impeachment and indictment), differ in point of form," Id. 886 "Impeachment is in the nature of an indictment. There must be a sufficient statement to bring the accused to plead and not to demur," per FINCH, 6 Id. 354. Such is the language of many authorities.

[2] In *Flood's Case*, 2 How. S. T. 1156, the House of Lords resolved that the Commons had no power of judicature—no coercion against any but in matters concerning their own house.

It is also important to distinguish an impeachment from a trial before the "Court of the Lord High Steward." The office of this court is briefly this: whenever a peer is indicted in the ordinary courts, in order that his case might be removed thence to be tried by his "peers," a commission was issued by the king to a particular nobleman to act as judge (Lord High Steward). Such other peers as the king thought fit to name, not less than twelve in number, were associated with the Lord High Steward to act as triors of the questions of fact, or as jurors. It is substantially a court of commission of oyer and terminer; the High Steward decides the law; the other peers try the fact: 4 Hatsell's Precedents 278. This court differs from a court of impeachment in three respects: first, it only tries an indictment found by a grand jury in a county; second, it may, and perhaps now must, be held during a recess of Parliament; third, it may, at common law, consist of a number less than the whole House of Peers. The king might resort to this tribunal to ruin a hated nobleman, as he could pack it with his own creatures. It was for this reason that the great Earl of Clarendon fled from England, because he learned that Charles II. intended to bring him before the Court of the Lord High Steward.[1]

It is the more important to distinguish the Court of Impeachments from that of the Lord High Steward, as the president of the former court in capital cases is called by the same name. It is therefore easy to confound cases in the two courts, unless care is taken to observe the distinctions which have been pointed out.

The result is, that there are in general by the English common law two parallel modes of reaching a particular criminal: he may either be indicted or impeached. If he is indicted first he may be impeached afterwards, and the latter trial may proceed notwithstanding the indictment.[2] On the other hand, the King's Bench held in *Fitzharris's Case*, that an impeachment was no answer to an indictment in that court.

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[1] The statute of 7 Wm. III., c. , prevented the packing of the court in cases of treason and misprision of treason by requiring the whole number of peers to be summoned at such trials.

[2] Thus in *Stafford's Trial*, the Lord High Steward said, "You are not tried upon the indictment of treason found by the grand jury, though *that too be in the case*. You are prosecuted and pursued by the loud and dreadful complaint of the Commons, and are to be tried on the presentment made by the grand jury of the whole nation:" 7 How. S. T. 1297.

It may be asked, why, then, is the cumbrous process of impeachment ever resorted to? The answer is, that there were often found in England persons who could not readily be tried by the common law courts, either owing to an influence which overshadowed the ordinary tribunals, or because technical rules of practice made the usual remedies scarcely worth pursuing. Moreover, impeachment was often adopted as an instrument of faction, and was especially active when society was disturbed by party contests or was in the throes of a revolution. In fact, through this process, Parliament ultimately triumphed over the executive, and parliamentary government with ministers responsible to the Commons for executive acts was formed.

When the United States constitution was framed, trial by impeachment was fully developed. It was not, however, adopted in that instrument as a regular mode of criminal procedure, to be employed in lieu of an indictment. It was made a means of trial of a crime so far as it had a political bearing. It is used as a means of depriving officers of their offices and of disqualifying them from holding such positions in the future. Still it is requisite that a *crime* should be committed as a basis for the accusation. The constitution provides, in substance, that the offence, so far as it has a purely criminal aspect, shall be tried in the ordinary courts; while so far as it affects the official character, it shall be the subject of impeachment.[1] Though the English theory and procedure still substantially continue, impeachment in our law has a comparatively narrow scope. The House of Representatives, in analogy to the English House of Commons, has the exclusive power of impeachment, and the judicial power is vested in the Senate, in analogy to its deposit in the House of Lords.

II. *The crimes for which an impeachment may be had.*—Upon this topic it is important to make two inquiries: first, what were the subjects under the English law which could be tried by impeachment; second, what cases under our system can be tried in this manner.

In examining the first question, it must be conceded that the judgments of the courts are not absolutely uniform. This could hardly be expected, both because there is no system of appeal by

[1] This wise provision is traceable to the N. Y. Cons. of 1777, and probably to the pen of John Jay.

means of which authoritative precedents could be established, and because the House of Lords has been at times impelled by faction or overborne by importunity or overawed by fear. The weight of authority is therefore to be followed. So said the great Selden, in a speech which he made as one of the committee of the House in the impeachment of Ratcliffe. "It were better to examine this matter according to the rules and foundations of this House than to rest upon scattered instances:" 4 How. S. T. 47. The decided weight of authority is, that no impeachment will lie except for a true crime, or, in other words, for a breach of the common or statute law, which, if committed within any county of England, would be the subject of indictment or information. This proposition is plainly inferred from the doctrine already established, that impeachment is simply a method of procedure. It presupposes the existence of the crime for the redress of which a trial is instituted. What would have been the check upon the most arbitrary action of the House of Lords, if it might decide the existence of a common-law crime without reference to already settled rules? This tribunal was only rarely called to act—during the reign of the Tudor family its functions were entirely suspended. The rules of the common-law courts were in daily discussion and exercise. The fundamental distinction between felonies and misdemeanors was fully recognised by the House of Lords in cases of impeachment. It is asserted, without fear of successful contradiction, both upon authority and principle, notwithstanding a few isolated instances apparently to the contrary, that no impeachment can be had where the King's Bench would not have held that a crime had been committed, had the case been properly before it. There are no doubt extreme cases favoring an opposite view. Thus, the Duke of Richmond was impeached in 1641, among other frivolous charges, on the ground that he had proposed an adjournment while a member of the House of Lords. The Commons were so offended with him for attempting to check the enactment of a bill which they had much at heart, that they accompanied the impeachment with a petition to the king to remove the duke from all offices of public trust, in which petition the Lords refused to join: 4 How. S. T. 120. This is but the excess of the lower House, resolved that no obstacle shall stand in the way of its shortest path to its destined goal. In early times a quarrel between great noblemen excited the interest of

the public to such an extent, that the matter was brought up for disposition in Parliament. In such a feud between the Bishop of Winchester and the Duke of Gloucester (A. D. 1451), there was a formal award of acquittal of the party accused, and the Lords "enjoined them to be firm friends for the future, and by such inducements wrought upon them that they shook hands, and parted with all outward signs of love and agreement * * which gave a mighty satisfaction to all people:" 1 How. S. T. 152. Perhaps no more ingenious plan has been devised to settle the strifes of embittered politicians, since, while it soothes the spirit, it secures notoriety.

A strong instance of the exercise of a broad power of impeachment is found in the last charge of a series made by the Commons against one of the worthless judges of Charles II.'s reign, Ch. J. SCROGGS. Its words are: "Whereas, said W. Scroggs being advanced to be chief justice of the Court of King's Bench, ought by a sober, grave, and virtuous conversation, to have given a good example to the King's liege people, and to demean himself answerable to the dignity of so eminent a station; yet he, the said Sir W. Scroggs, on the contrary, by his frequent and notorious excesses and debaucheries, and his profane and atheistical discourses, doth daily affront Almighty God, dishonor his Majesty, give countenance and encouragement to all manner of vice and wickedness, and bring the highest scandal on the public justice of the kingdom." This was an article in an impeachment for high treason! The articles were never tried, so that they only serve to show how far the doctrine of "constructive treason" may be pushed by ingenious committees: 13 Lords Journals 737.

The danger of a loose construction of the judicial power of a legislative body was most strikingly shown when the House of Commons during the revolution, in consequence of the abolition of the House of Lords, had centered within it both the power of impeachment and the power of trial. At the trial of James Naylor, an insane ranter, who would now be sent to a lunatic asylum, there was a large minority voting to put him to death for blasphemy. The majority prevailed by deciding to whip him, set him in the pillory, bore his tongue through with a hot iron, and to confine him in Bridewell at hard labor.

Undoubtedly some cases which at the present time appear inexplicable on any sound theory, depended on a construction of

statutes now forgotten, or upon a violation of official oaths, or a perverted application of legal rules to instances not properly governed by them. Thus, a prominent citizen of London was impeached for presenting a petition to Parliament, which now seems quite harmless; but it was *asserted* to be a seditious libel, and consequently criminal: 4 How. S. T. 152.

While the irregular cases upon this subject are few, the rule that a true crime must have been committed is settled beyond dispute. This is clearly shown by the way in which the House of Commons when flushed with power or chafed with indignation rebel against it. Over and over again they assert that the great statute of 25 Edw. III., defining treason, is not applicable to trial by impeachment. They plausibly maintained that the statute was only for the courts of ordinary criminal justice; and that the statute itself applied a different rule to trial by impeachment. But the law was settled after the most extended and prolonged discussion in favor of the doctrine that the court of impeachment must administer the same law as the criminal court: 12 How. S. T. 1213; 6 Id. 346. Thus the Earl of Orrery was not tried in A. D. 1669, as the offence charged was thought not sufficient to constitute treason, and the case was directed to be heard in a court of law:[1] 6 How. S. T. 917.

The stringency of these rules often led the Houses, when under excitement, to pass Bills of Attainder. They could enact that an obnoxious person was guilty, if they could not prove his offence. This course was resorted to in the well-known case of the Earl of Strafford. So, too, when the Earl of Clarendon in Charles II.'s time could not be successfully impeached, the king intended to bring him before the Court of the Lord High Steward, which could be organized so as to secure a conviction: 3 Campbell's Lord Chancellors 243-4, Lond. ed. 1848.

The later and most authoritative decisions are clear to this effect. In the impeachment of the Earl of Macclesfield, who was a great lawyer and at one time Lord Chancellor, the case was put exclusively on such criminality as is the subject of an indictment. It was argued that he had violated the statute of 6 Ed. VI., c. 16,

[1] In the case of Inigo Jones, against whom a charge was made of pulling down a church, the Commons refused to impeach on the ground that it was a matter of private right: 4 Hatsell's Precedents 132.

concerning the administration of justice, while he rested his defence on the fact, that it was not criminal for a judge to receive presents either by common or statute law. The decision of this case against Macclesfield is criticised by Lord Mahon and others, but is defended by Campbell, on the ground that the statute of Ed. VI. was violated: 16 How. S. T. 823; 4 Camp. Lord Chan. 536. This is one of the best-considered cases on the subject, and preceded the formation of our Constitution by only a few years.

The last case of impeachment in England, that of Lord Melville in 1806 for malversation in office, is very instructive. The question was put to the judges whether the acts with which he was charged were unlawful so as to be the subject of information or indictment. It having been decided that they were not, Lord Melville was acquitted: 29 How. S. T. 1470. These last two decisions, made when there was an entire absence of party feeling and the court acted throughout with judicial impartiality, deservedly outweigh scores of instances, if they could be produced, which have occurred in the heat and frenzy of a revolution.

The court in general relies with close dependence upon the opinion of the common-law judges on the law of crime and criminal evidence, often exacting their continuous attendance to the detriment of other public business.[1]

The text-writers and leading jurists are of the same opinion. Says Wooddeson: "The trial differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevail. For impeachments are not framed to alter the law, but to carry it into more effectual execution where it might be obstructed by the influence of too powerful delinquents or not easily discerned in the courts of ordinary jurisdiction by reason of the peculiar quality of the alleged crimes. The judgment thereof is to be such as is warranted by legal principles or precedents:" Lectures, vol. 2, p. 611. So Cushing, in his "Law and Practice of Legislative Assemblies," says: "The proceedings are conducted

[1] In *Lord Clarendon's Case*, the Lords inquired of the judges if there was any treason. As they answered in the negative, it was so decided: 4 Hatsell's Precedents 153–4; see also opinion in the *Case of the Earl of Danby*, Id. 180. In *Warren Hastings' Trial*, the Lords consulted the judges on nearly every point of evidence that arose: 4 Id. 282. The judges were ordered to attend *Dr. Sacheverell's Trial* till it was over, but afterwards three of their number were permitted to proceed on their circuit: Id. Their opinion was asked on the merits of the case.

substantially as they are upon common judicial trials as to the admission or rejection of testimony, the examination and cross-examination of witnesses, and the *legal doctrines as to crimes and misdemeanors:*" § 2569. Lord Chancellor COWPER, in an impeachment case not long before our revolution (A. D. 1715), said: "Though one of your Lordships supposes this impeachment to be out of the ordinary and common course of law and justice, it is yet as much a course of proceeding according to the common law as any other whatever. If you had been indicted, the indictment must have been removed and brought before the House of Lords, Parliament sitting. In that case, it is true, you had been accused by the grand jury of one county; in the present, the whole body of the commons of Great Britain by their representatives are your accusers:" 4 Hatsell 295.

The framers of the New York Constitution of A. D. 1777 held this view, for they couple together in the same sentence, impeachments and indictments, as though they were only modes of trial. "In every trial on impeachment or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel as in civil actions:" Art. 34.[1]

I have dwelt the longer on this point because many seem to think that a public officer can be impeached for a mere act of indecorum. On the contrary, he must have committed a true crime, not against the law of England but against the law of the United States. As impeachment is nothing but a mode of trial, the Constitution only adopts it as *a mode of procedure*, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law.

A basis for a very important conclusion has now been laid. It is this: as there are under the laws of the United States no common-law crimes, but only those which are contrary to some positive statutory rule, there can be no impeachment except for a violation of a law of Congress or for the commission of a crime

[1] Says Blackstone, "An impeachment is a prosecution of the already known and established law:" 4 Com. 259. The judges were of opinion in *Lord Clarendon's Case*, that the evidence on an impeachment must be the same as on an indictment: 6 How. S. T. 514. Mr. Webster has well expounded the whole subject in his speech in defence of Judge Prescott. Though he made an argument as counsel, yet his remarks on this point are carefully elaborated and characterized by great precision of statement. Webster's Works, Vol. 5, pp. 513–515.

named in the constitution. English precedents concerning *impeachable crimes* are consequently not applicable.

There was for a long time a fluctuation of opinion on the point whether the common law crimes did not exist under the general government. Justice Story lent the great weight of his influence to the opinion in favor of their existence. His discussion of the subject of impeachment rests upon this view. Mr. Rawle is of the same opinion. Both of these eminent writers admit that if there are no common-law crimes for which indictments can be brought, there are none for which impeachments can be instituted. Mr. Rawle is especially clear upon this point. "The doctrine that there is no law of crimes except that founded in statutes renders impeachment a nullity in all cases except the two expressly mentioned in the constitution, treason and bribery, until Congress shall pass laws declaring what shall constitute the other high crimes and misdemeanors:" Rawle on the Constitution, p. 273, ed. 1829; Story on the Constitution, title "Impeachment."

That there are no crimes against the United States which are not statutory, is fully proved by a great number of cases collected by Mr. Wharton in his work on Criminal Law. Though he dissents from this view, he acknowledges that it is settled by the decisions: §§ 163–174. The decisions of the Senate, as a court of impeachment, should not be regarded as adverse to this view. In the three cases already tried, of Pickering, Chase, and Blount, only one, Pickering, was condemned. His case was heard *ex parte*, as he did not appear, and was decided by a strict party vote: 2 Hildreth's History 518. As far as precedent is concerned, the question in that court is still open and should be decided in accordance with principle.[1]

The result is, that unless the crime is specifically named in the constitution, impeachments like indictments can only be instituted for crimes committed against the statutory law of the United States.

III. *The method of procedure.*

It will not be necessary to go into special detail upon this

[1] See, among other cases, 1 Wash. C. C. 84; *U. S.* v. *Maurice*, 2 Brock. 96; *U. S.* v. *N. Bedford Bridge*, 1 Woodb. & Minot 401; *U. S.* v. *Lancaster*, 2 McLean 431.

subject, except upon those points which involve great constitutional inquiries. There are, however, some topics connected with this matter of vast practical importance, such as the right to suspend an officer from his office while the trial is in progress. While other points connected with procedure will be briefly alluded to, it is intended to treat the one in question with a fulness justified by its importance.

When an impeachment has been resolved upon, a member usually rises in his place in the House of Commons, and makes a charge of crime which he supports by proofs and moves for an impeachment. If such is the determination, the member in question is ordered to go to the House of Lords in company with others to impeach the accused. The formal articles of impeachment are subsequently prepared. This course, however, was deviated from in the impeachment of Warren Hastings, and that of Elijah Impey (Dec. 1787), in which instances a member of the House presented at once from his place formal articles of impeachment. In this country, the impeachment is commonly brought forward by report of a committee to whom the matter has been previously referred.

The most important points connected with procedure are arrest and suspension. These questions do not appear to have been anywhere systematically considered, and will be discussed separately.

The subject of arrest under the English system is of great consequence, as it secures the attendance of accused parties to abide the event of a proceeding which may involve liberty or life.

The rules of arrest distinguish between commoners and peers. A commoner may be arrested upon any charge; a peer can only be required to appear as a criminal in the case of high treason or other capital cause.[1] The Commons may arrest in the first instance, and in a proper case hold the accused to bail;[2] when the prisoner has been delivered to the House of Lords, that body has the control and may admit to bail if the case justifies it.[3]

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[1] 15 How. S. T. 806; Id. 1170; 14 Id. 240, 287.

[2] 4 Hatsell's Precedents 256.

[3] 15 How. S. T. 20; *Dr. Sacheverell's Case*, 4 Hatsell 265; Commons' Journal, 22 Dec. 1709. A form of recognisance of bail is found in Lords' Journals, 22 and 23 Dec. 1640, 4 Hatsell 128. The Commons often interfered with the discre-

The most stringent measures of arrest have been sometimes resorted to. One of them is thus described: "Maxwell (the officer of the court) came to the King's Bench where the judges were sitting, took Judge Berkley off the bench and carried him away to prison; which struck a great terror in the rest of his brethren then sitting in Westminster Hall, and in all his profession:" Whitelocke's Memorials, p. 39.

In the United States system of impeachment, no arrest is necessary. If the accused when properly summoned does not appear, the case may be heard and judgment rendered in his absence. The punishments do not require any personal presence for their administration, and they cannot be evaded by his non-attendance.

Suspension from office.—Can the accused be suspended from office during the progress of the trial? This subject is of vast importance in case of the impeachment of a President, as an assertion of such a power might lead to the utmost confusion and perhaps to civil war.

I strongly believe that there can be no suspension from office, on two principal grounds: 1st, from the practice in England; 2d, from the true construction of the language of the United States constitution.

1. The cases in the English practice admit of a threefold classification.

(1). Impeachable crimes committed by a member of the House of Commons.

(2). Like crimes on the part of a member of the House of Lords.

(3). Similar charges against a person holding an administrative or judicial office, whether a member of either House or not.

(1). An instance of the first kind is found in the impeachment of a Sir William Penn, while he was a member of the House of Commons. He was suspended by that House from his place therein while the trial was going on: 6 How. S. T. 872. The power to suspend is necessarily included in the power of expulsion. Accordingly, Sir John Bennett, who was a member of the

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tion of the Lords. In one case, bail was allowed, then, on the remonstrance of the Commons, refused, and afterwards allowed: 4 How. S. T. 56, 82. In one case, a suggestion is made to the Lords, that the gaol is the best place for the prisoner.

House, and at the same time Master in Chancery and judge of a Probate Court (Prerogative Court of Canterbury), being accused of bribery and judicial corruption, was expelled from the House and charges thereupon made by impeachment: 4 Hatsell 121; 14 How. S. T. 288–9. See in 8 How. S. T. 156, a like expulsion of one Brunckard.

(2). In cases of the second class, a distinction must be taken between misdemeanors and felonies. In case a member of the House of Lords is charged with a misdemeanor, he is allowed to remain in his place, and to vote upon all matters which do not concern the trial of the charge upon the merits: *Case of the* 12 *Bishops*, 4 Hatsell 151.

On the other hand, where the trial is for a capital crime, such as treason, he may be sequestered from his place and kept in close custody in the Tower or otherwise. This course has been adopted in many instances. It will not be followed in a case of treason unless the offence is so specially charged, that on the perusal of the articles of impeachment, it can be seen that if the charge is true, the offence has been committed: *Lord Clarendon's Trial*, 6 How. 367.

(3). The last class of cases includes those where an officer is charged with malversation in office. These must be separated into two subordinate divisions: one, where the office is holden at the king's pleasure; the other, where the tenure is certain, so that the officer has a claim to continue in his office.

Offices held at the king's pleasure are in the main (so far as questions have arisen), offices of trust and judicial. All that the House of Commons ever pretended to ask in such cases was, that the Lords should concur with them in addressing the king to remove or suspend the office-holder.

An "address" is not a judicial but a legislative act. It is in the nature of a joint resolution. Still, no case, as I believe, can be found in which the Lords ever consented to join with the Commons to address the king, to remove or suspend a judicial or other like officer during the *course or progress* of an impeachment. On the other hand, the precedents of refusal to unite with the Commons in such an address are numerous. Nor did the Lords alone ever address the king to that effect under the like circumstances, although they have done so at the close of the trial. These pro-

positions, so far as they are affirmative in their nature, demand the support of authorities.

When Lord Bacon was impeached and confessed his crime, "a difficulty remained in proceeding further while he retained the Great Seal; for, by the rules and customs of the House of Lords, a defendant produced before them is to receive sentence on his knees at the bar, and the Lord Chancellor, if present, must preside on the woolsack and render sentence. This embarrassment was removed on the 1st of May, when the king finding all further resistance hopeless, sent the Lord Treasurer to demand the Great Seal, which Bacon surrendered:" 2 Camp. Lord Chan. 408, Lond. ed. 1858. Here, we have most clearly the principle that the Lord Chancellor could not lose or be suspended from his office before conviction and sentence; and that the only remedy was to address the king who appointed him. I now refer to the action of the House of Lords, as exhibited in their journals. After Bacon's confession, it was "agreed by the House of Lords to move his Majesty to sequester the seal; and the Lords entreated the Prince, his Highness, that he would be pleased to move the king's majesty therein, whereunto his Highness condescended, and certain lords were appointed to attend the prince to the king:" Lords' Jour., 30th April 1621. Does this look like a power by the Lords to suspend or remove a judicial officer before sentence? How can this language of entreaty and praise of condescension be accounted for, on the theory that the power of suspension is inherent in the Court of Impeachment?

So, when the worthless and obnoxious Scroggs was impeached, the House of Lords refused to join the Commons, in addressing the king to suspend him from the execution of his office: Jour. of the Lords, vol. 13, 738; 4 Hatsell 156. The Commons were greatly offended by this refusal, and understood it to be a positive decision upon the point, that while an office-holder was uncondemned, he should not be affected in the administration of his office. Says Sir W. Jones, "for suspending him (Scroggs) from his place, they would not put a question." "They mean that he shall continue in his place, notwithstanding his impeachment." Said Sir F. Winnington: "For the king to sequester Scroggs from his place, they would not address for it, but leave it to Scroggs's *modesty* whether he would exercise it or no:" 8 How. S. T.

213, 214. We all know what Scroggs's modesty was; and the likelihood that his possession of that virtue would interfere unfavorably with his disposition to exercise judicial functions.

This case shows conclusively that one hundred years before the adoption of the Federal Constitution, the House of Commons had not the remotest idea that they had the power of suspension, or that anything could be done in the case except to frame a joint address to the king. Winnington and Jones were then as prominent as Bingham and Boutwell are at Washington to-day. If the Lords would not act in Scroggs's Case, there is no other instance likely to happen in which they would interfere.

Again, Judge Berkley, who was impeached in 1641, in the very heat of the English rebellion, sat as sole judge in the King's Bench for one whole term after his impeachment. The same fact was true of Baron Trevor, in the Court of Exchequer: 1 Clarendon's Hist. of the Rebellion 441, Oxford ed. 1840; 4 Hatsell's Prec. 173, note. This happened, too, after power had centered in the Commons—for Berkley was not condemned till 1643.[1]

Moreover, instead of claiming the exercise of the right of suspension, the House often proceeded with great delicacy towards the accused, on account of his possession of a great office. Thus, when Lord Bacon was impeached for misconduct as Lord Chancellor, it was debated whether he should be brought to the bar as an ordinary criminal to hear the charges against him, or that respect being had to his person *as yet having the Great Seal*, the charge should be sent in writing. It was decided that the latter course should be adopted: 4 Hatsell 203.

The only case known to exist, where the Lords acceded to the prayers of the Commons in respect to non-performance of judicial functions, is one, where there was a resolution that *new* judicial duties should not be conferred upon persons impeached. In August 1641, the Lords resolved that the "peccant" judges, Berkley and others, should not be named in the commission for the circuits, for that for them being thus impeached to become judges of men's lives and estates would be a thing of great offence and distraction: 4 Hatsell 133.

This very Judge Berkley, as has been seen, continued to fill

[1] There were only ten Lords present at his conviction.

the office of judge to which he had been previously appointed. Even in those cases where the Commons asked for a joint address, they were careful to disclaim any control over the subject. Thus, when during the progress of the revolution (A. D. 1640), they desired the Lords to move his Majesty, that one impeached should be removed from the king's service; they wish that this should be "considered *as an opinion*, but not as a mulct upon him:" 4 Hatsell 129.[1]

The Commons contrived methods to evade the stringency of these rules of procedure. Thus, in one case, they sought to have the Duke of Buckingham committed to custody, as they held it wrong that he "should have so great a post of power and sit as a peer in Parliament." Of course no order of custody could properly have such an effect, as bail ought to be received, except in capital cases. The necessity of resorting to such an artifice only shows the unbending rigor of the rule: 2 How. S. T. 1302–5.

Thus far have been considered offices held at the pleasure of the king. When the tenure is fixed and permanent, the case is still stronger. In that case, the Commons will not even vote to address the king for removal from office though no impeachment is intended. In other words, they will not in such a case adopt a joint resolution asking for the removal of an unpopular and obnoxious minister, not charged with crime, though they may ask for the dismissal of such a minister from offices held at the king's pleasure. This distinction was strongly marked in a discussion concerning one of the Dukes of Buckingham (6 How. S. T. 1054). The Commons refused to address the king to remove the duke from offices in which he had a definite or permanent tenure, but asked that he might be removed from offices held at

[1] There were undoubtedly fiery orators who claimed at times much more than is here conceded. In one case, it was asserted by a member, that, on the moment of impeachment the accused became civilly dead, and that therefore his offices should be sequestered! No one else defended this extravagant and absurd view: 4 How. S. T. 56. Sometimes, to avoid odium, the accused lowered his insignia of office. Thus, when Lord Middlesex, at the time Lord Treasurer, appeared to answer to an impeachment, it was noticed and recorded by the reporter, that he did not have his staff in his hand as Lord Treasurer: 2 Id. 1119. This was no doubt a measure of policy, while retaining the substance of power, to avoid an irritating exhibition of it.

the king's pleasure. There was in this case no impeachment. But, immediately afterwards, having resolved to impeach the Earl of Arlington, they refused an address for removal from any office. There is good reason for the difference of action in the two cases; where there is no charge of crime, the king may be asked to withdraw his favor; where a crime is alleged, the withdrawal of patronage tacitly admits the charge, and exposes the accused to a loss of reputation, and may diminish the reasonable chances for an acquittal

2. *Suspension from office under the United States Constitution.*

Where an officer, like the President, holds his office by a certain tenure, the people, according to the principles of law, have a right to his continuous services, of which they cannot be deprived before his conviction for an impeachable offence, unless there is something in the language of the constitution which confers the power of suspension by express words or necessary implication. If the officer holds at the pleasure of the appointing power, he may, of course, be arbitrarily removed by the person exercising the power of appointment.

There is no express language in the constitution conferring the power of suspension. There is no necessary implication, because it has been shown by English practice that the power to impeach does not involve the power to suspend.

It is well, however, to go further than this. I maintain that the history of the constitution, the debates upon it, and contemporary documents, plainly show that the power of suspension was *studiously excluded.*

In proof of this proposition, I cite, among other documents, the New York Constitution of 1777. It is well known that this instrument was drawn by an eminent lawyer, Mr. Jay, afterwards chief justice of the United States. But few lawyers then understood the subject of impeachment.[1] It is clear, however, that it was thoroughly comprehended in its leading features by Jay, and

[1] John Adams, speaking of this subject, says, that in 1774 there was only one copy of the State Trials and Selden's Tract on "The Judicature of Parliament," in Boston, and, as he believes, not another copy in the United States: 10 Adams' Works 238-9.

the clauses in the Constitution of the United States were largely taken *verbatim* from his draft. Note their correspondence.

NEW YORK CONSTITUTION OF 1777.

"The power of *impeaching* all *officers* of the state for venal and corrupt conduct in their respective offices [shall] be vested in the *representatives of the people in assembly.* * * * Previous to the trial of every impeachment, the members of the said court [Senate, &c., described in 32d Article] shall be respectively *sworn* truly and impartially to *try and determine* the charge, according to evidence. No judgment of the said court shall be valid *unless it shall be assented to by two-thirds part of the members* then *present,* nor shall it *extend further than to removal from office and disqualification to hold* or *enjoy any* place of *honor, trust, or profit under* this state. *But the party* so *convicted shall be nevertheless liable and subject to indictment, trial, judgment, and punishment, according to* the laws of the land:" Art. 33.

CONSTITUTION OF THE UNITED STATES.

The House of Representatives shall have the sole power of impeachment: Art. 1, § 2, Subd. 5.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on *oath* or *affirmation.* * * * No person shall be convicted *without the concurrence of two-thirds* of *the members present. Judgment* in cases of impeachment shall not *extend further than* to *removal from office and disqualification to hold* and *enjoy* any office of *honor, trust, or profit under* the United States; *but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to* law: Art. 1, § 3, Subd. 6, 7.

It will be perceived that the variations are simply to adapt the language to the general government instead of the state. It is believed that those words could have then been found in no other constitution but that of New York. Only ten years had elapsed since they were first composed. There cannot be the smallest doubt that the New York Constitution was before the minds of the framers of the United States Constitution. If this be conceded, an important question arises. That instrument specifically provides that in case of the impeachment of the governor and other officers there shall be a suspension from office until acquittal. Why was this clause omitted from the United States Constitution? The state constitution proceeds: "*In case of the* impeachment of the governor or his *removal from office, death, or resignation,* &c., the lieutenant-governor shall exercise all the *power* pertaining to the *office* of governor," &c.: Art. 20. The United States Constitution provides, "*In case of the removal* of the president

from office, death, or resignation, or inability to discharge the *powers* and duties of the said *office*, the same shall devolve on the vice-president," &c. Everything is copied again, except the clause concerning impeachment.

Here, in the New York Constitution, was a well-known precedent fixing the right of suspension of office by positive law. The office of governor devolves, on impeachment, upon the lieutenant-governor, as in the case of death. Can it be possible that the authors of the United States Constitution intended a suspension, and, at the same time, desired to leave the whole matter to a contest of strength between Congress and the Executive, and at the first impeachment which happened to drive the country to the brink of a revolution? It will be hard to believe, when the attention of the eminent lawyers who devised that instrument was called to the point, that they failed to provide for it.

But more than this; there is direct evidence that the point was actually presented in the convention that devised the United States constitution, and passed upon. It was first suggested by Gouverneur Morris, who was a member of the convention framing the New York constitution. He said: "Is impeachment to suspend the President's functions? If it is not, the mischief will go on. If it is, the impeachment will be merely equivalent to a displacement, and will render the executive dependent on those who are to impeach:" 2 Madison Papers 1154.

At a later day, having come to a definite conclusion, he in conjunction with Mr. Rutledge moved that "persons impeached be suspended from their offices until they be tried and acquitted."[1] To this Mr. Madison replied: "The President is made too dependent already on the Legislature, by the power of one branch to try him in consequence of an impeachment by the other. This intermediate suspension will put him in the power of one branch only. They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate:" 3 Madison Papers 1572–3. These wise and pregnant words had their due influence, and the amendment was rejected by the vote of eight states to three.

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[1] This is almost a literal reproduction of the language of the 32d Article of the N. Y. Cons. of 1777.

There is here the strongest evidence for the conclusion that the convention did not suppose that the power to suspend was inherent in either branch of the legislature, and that it deliberately intended that the power should not be conferred.

There is an interesting incident in the life of John Adams, which serves to show that he or the Massachusetts lawyers in 1774 did not suppose that the impeaching house had the power of suspension. He argued that the right of impeachment existed inherently in the colonial legislature, though there was no mention of it in the charter. He succeeded in inducing the Lower House to impeach Chief Justice Oliver. The impeachment was ultimately rejected. No one claimed that the lower house could suspend Judge Oliver while the impeachment was pending. What was accomplished was to so act on public opinion that no juryman would take the requisite oath, and thus practically prevent the progress of trials. Mr. Adams says: "Chief Justice Oliver opened his court as usual. Grand jurors and petit jurors refused to take their oaths. They never, as I believe, could prevail on one juror to take the oath. I attended at the bar in two counties and heard jurymen say to Chief Justice Oliver to his face, 'The Chief Justice of this court stands impeached by the representatives of the people of high crimes and misdemeanors, &c. I therefore cannot serve as a juror or take the oath.' The cool, calm, and sedate intrepidity with which those honest freeholders went through the fiery trial filled my eyes and my heart:" 10 Adams's Works 236. Why expose these brave men needlessly to this fiery trial and subject them to punishment for contempt of court, if the power of suspension from office existed in the impeaching house?

But I have already dwelt too long upon this topic, and pass to a rapid consideration of the other branches of procedure. The articles of impeachment having been prepared and the answer of the accused having been received and a reply made, if necessary, a day is fixed for the trial. The court in England is organized with a pomp and solemnity befitting the occasion.[1] The proceedings on the part of the prosecution are conducted by a committee of the House known as "managers." An opening speech is

[1] An excellent and graphic description of the court is found in 7 How. S. T. 1194, at the trial of the Earl of Stafford, A. D. 1680.

made by one or more of them, who in the old reports is said to "aggravate" the case.[1]

The trial thenceforward proceeds much in the same way as in ordinary criminal prosecutions. Counsel represent the accused; there is the usual compulsory attendance of witnesses. The rules of evidence are applied as found in the common-law authorities. The peculiar arrangements of the English court necessitate much delay, so that years may elapse in a closely contested case. No good reason is perceived for the tedious ceremonial of the English tribunal, except it be to make the avenues to an impeachment as difficult as possible, and thus to render this class of trials infrequent.

The rules attending the delivery of the judgment are somewhat peculiar. Questions which are considered to involve the merits

[1] Sometimes the address of the manager is of sustained dignity and lofty eloquence, at other times one is reminded of a so-called "Buncombe" speech in a modern legislature. England has had in former times her full share of frothy and noisy declaimers, and the bombast and fustian of their speeches have nowhere been excelled. I am tempted to give a brief extract from the speech of Captain Mervin on the impeachment of Lord Chancellor Bolton, of Ireland (A. D. 1640). In the first place he assembles the Lords around an imaginary death-bed. "My Lords, I am commanded to present to you Ireland's tragedy, the gray-headed Common Law's funeral, the active Statutes' death and obsequies. Who sees not the Statute Laws lying upon their death-beds stabbed by proclamations," &c. To avoid the smell of mortality, he next rushes into the open air. "My Lords, having such a full and rushing gale to drive me into the depths of these occasions, I can hardly steer and confine my course within the compass of your patience," &c. Now, by a single plunge, he descends to the infernal regions. "My Lords, I cannot find in any surviving chronology of times, this season, to be paralleled, which makes me view the records among the infernal spirits, to find if matched there. The most vehement and traitorous encounter of Satan is deciphered in the true example of Job: he overthrows not Job's Magna Charta, he disseizes him not of his inheritance, nor dispossesses him of his leases, but only disrobes him of part of his personal estate; when he proceeds to infringe Job's liberty, he doth not pillory him, nor cut off his ears, nor bore him through the tongue, he only spots him with some ulcers. *Here* Satan stays, when these persons by their traitorous combinations envy the very blood that runs unspilt in our veins, and by obtruding bloody acts will give Satan six ace and the dice."

But he has not yet reached the depths of the occasion, and mercifully refrains. He closes. "My Lords, this is the first sitting, and I have only chalked out this deformed body of High Treason, I have not drawn it at length, lest it might fright you from the further view thereof." Who shall say after this that there is not hope for parliamentary eloquence in this country, even in those states where the American Eagle is still a native. One hundred and fifty years later, the same court was charmed with the splendid periods of Burke and Sheridan on the impeachment of Warren Hastings.

of the case, having been agreed upon, the court is assembled, and each member is interrogated by the Lord High Steward, or other presiding officer, in the presence of the accused and the House of Commons, as to his opinion upon each question. The peers, commencing with the one lowest in rank, rise successively in their places as the questions are put, and standing uncovered and placing their right hands upon their breasts, say "Guilty," or "Not guilty, upon my honor." If a majority are of the opinion that the accused is not guilty, the impeachment is of course dismissed. If found guilty, judgment is agreed upon. The next step is for the Commons to demand judgment. If they refrain from this demand, their action is equivalent to a pardon. So, too, the impeachment may be dismissed for want of prosecution.

In the American practice, there is less formality than in the English system. After all parties have been fully heard, the Senate proceed to a consideration of the case. After reaching a conclusion, the court is assembled for the purpose of giving judgment, and each member rising in his place, answers guilty or not guilty to each article of impeachment, as the question is put to him. If two-thirds concur in the guilt of the accused on any one article, the court proceeds to fix the proper punishment. The details of the practice will be found in Story's Commentaries on the Constitution, vol. 2, §§ 805–10; Cushing's Law and Practice of Legislative Assemblies, §§ 2535, 2570.

The pages of the English State Trials are disfigured by the details of the revolting punishments which have been inflicted by the court. In America, the solemnity of the judgment is not affected by the disgust and horror felt at the barbarity of many of the English sentences. When the proceedings are conducted with due impartiality, there can be no more effective and awful sentence than that an entire nation has pronounced one whom it has intrusted with a high office, perhaps the highest in its gift, unworthy of its confidence. The judgment here may not only exclude the officer from his present office, but may disqualify him from holding official position in future. It is not necessary that the two sentences should be combined.

IV. *General Remarks.*—In casting the eye over the long roll of English impeachments, extending over a period of about five hundred years, the attention is attracted by the illustrious persons

who have been called before this most august tribunal of the English law. Dukes, earls, barons, and commoners, distinguished judges, lawyers, and authors, prominent statesmen and feeble women, have either succumbed to or defied the influences which there surrounded them. In imagination one can recall the Commons scowling and revengeful, the Lords truckling, submissive, and servile, the victim trembling and faint-hearted as he stood alone without power of speech or counsel to aid him in his extremity. At other times, the mind reverts to the noble oratory, with which some tribune of the people brands for ever the mark of infamy upon the man whom the voice of the nation has already condemned, and the court only gives form and dignified expression to the verdict of mankind.

This dramatic period of English history has passed away. There have been no impeachments for fifty years, and doubtless will be none of special importance, unless a revolution takes place. There is no *political* reason for impeachment at the present time, as the power of the Commons is never resisted by a minister or the Executive. In fact, it may be said in a representative government, that the absolute cessation of impeachments indicates that the legislative department has triumphed over the executive and his agents. There are some excellent remarks upon this topic in May's Constitutional History of England, vol. I., 435, Boston ed., 1863.

It is clear, however, that the process of impeachment often greatly disappoints those who resort to it. At the outset the "pomp and circumstance" of the trial flatter the vanity of the managers by attracting to them the attention of the public. But the tediousness of the proceeding soon dissipates the interest which depends merely upon the novelty of the occasion. Unexpected difficulties are met with; new events amuse or excite the public. The court is bound by precedents, and must proceed in accordance with law. At the end the few are convicted and the many acquitted.

It has been noticed that many of those who have employed this means to ruin their enemies have themselves, in the mutations of politics, been the victims of similar proceedings. This point was so forcibly stated by Lord Carnarvon in the only speech which he ever made in parliament (A. D. 1678), that I cannot forbear a quotation. The Earl of Danby (Sir Thomas Osborne) was then before the court. "My lords: I understand

but little of Latin, but a good deal of English, and not a little of English history, from which I have learned the mischiefs of such kind of prosecutions as these, and the ill-fate of the prosecutors. I could bring many instances, and those ancient; but, my Lords, I shall go no further than the latter end of Queen Elizabeth's reign, at which time the Earl of Essex was run down by Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, and your lordships know what became of Sir Harry Vane. Chancellor Hyde (Lord Clarendon) ran down Sir Harry Vane, and your lordships know what became of the chancellor. Sir Thomas Osborne, now Earl of Danby, ran down Chancellor Hyde, but what will become of the Earl of Danby your lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him:" 11 Howell S. T. 632, 633.

This most effective little speech saved, for the time being, the Earl of Danby from a commitment.[1]

What would be the effect of political impeachments upon our system of government, it is difficult to say. All analogy leads to the conclusion that they should be avoided until the last extremity, and that the trial should be preceded by the unmistakable verdict of the people. There is profound wisdom in the remark of that sound and calm lawyer, Sergeant Maynard, that "the trial and condemnation of one man at common law will work more upon people than ten impeachments:" 12 Howell S. T. 1212. It is the weakness of a *political* tribunal that, whether justly or not, it labors under the imputation of being moulded by faction; while it is the strength of a common-law court that every presumption is made by public opinion in favor of its justness and impartiality.

[1] The reporter adds that the Duke of Buckingham, who was no friend to Danby, had induced Lord Carnarvon to speak, thinking that as he was heated with wine, he would say something to Danby's disadvantage. But Lord Carnarvon having spoken with a remarkable humor and tone, Buckingham was both surprised and disappointed, and cried out, "The man is inspired, and claret has done the business."